IN THE

SUPREME COURT OF APPEALS

OF THE

STATE OF WEST VIRGINIA

SCHRADER BYRD & COMPANION, P.L.L.C., a West Virginia corporation,

Appellee

v.

No. 33184

FRANCIS G. MARKS,
JOHN L. MARKS, JR.,
PATRICIA J. MARKS,
ELIZABETH A. McCLURE,
M. CHESLEY MARKS,
ANTHONY MARKS,
CATHERINE D. MARKS,
EAST ENDERS, L.L.C., and
JOSEPHINE LUTHER,

Appellants

APPELLANTS' BRIEF

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Kind of Proceeding and Nature of the Ruling Below

This is an action brought by the law firm of Schrader, Byrd & Companion, PLLC, seeking a declaration as to the validity and applicability of a contingent fee agreement to coal royalties paid to the defendants after the settlement of a prior lawsuit. The civil action was filed on October 1, 2004, with an answers filed on December 2, 2004, and January 3, 2005. On July 1, 2005, the plaintiff filed a motion for summary judgment, which was granted by the Circuit Court of Ohio County on December 13, 2005.

Statement of Facts

In the late 1980's, the late Mary Catherine and defendant Josephine Luther discovered that property in which they owned an interest was being wrongfully mined. As a result, on December 20, 1988, Ms. Marks and Ms. Luther retained the services of Schrader, Byrd and Companion[1] ("Law Firm") to institute and prosecute their claim against various defendants for damages sustained by them as a result of the wrongful mining of their mineral property situate in Boone County, West Virginia, in which Ms. Marks and Ms. Luther each owned an undivided one-fourth interest.

As a part of that representation, the parties entered into a contingent fee contract, which provided that the Law Firm was retained to prosecute an action for "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property." The contingent fee agreement further provided that the Law Firm would receive a percentage of the "**loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property**."

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[1] **The firm was then called Schrader, Stamp, Byrd, Byrum & Companion.**

An action was filed, prosecuted, and in April, 1998, settled.[2] As a result of the settlement, Mary Catherine Marks and Josephine Luther received payment of $3,500,000 for damages for the wrongful and improper mining. As a result of that settlement, the plaintiff received an attorney fee of $1,050,000. In addition, the plaintiff received a fee from a prior settlement of $58,409.56, for a total of $1,108,409.56.

As part of the discovery in this case, the plaintiff produced time records which show that from the time the representation began through the settlement, the firm expended approximately 5,000 hours of lawyer and paralegal time. The billing records also disclose the hourly billing rate of each person who worked on the case. These records show that on an hourly basis, the firm would have recovered $416,301.50 for their services. As a result, the firm received a premium of 2.66 times their hourly fee for their services.

Once it was determined that the defendants had a valid interest in the coal property and that the interest had not been validly leased to the coal companies, the companies negotiated a new lease and side letter agreement with the defendants. The income generated from these new agreements was not "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property," but rather new income going forward.

After the settlement was reached, the Law Firm insisted that the future income generated from the new lease and side letter agreement was to be counted under the contingent fee agreement, even though the negotiation of the new agreements was not part of "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property."

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[2] Prior to settlement, the firm attempted to persuade the defendants to accept a settlement of $750,000.00, which, of course, would have resulted in a much lower fee. The defendants refused to accept the settlement, ultimately gaining the settlement above.

As is stated in the Affidavit from Josephine Luther, one of the signatories to the contingent fee agreement, which was submitted in opposition to the motion for summary judgment, in convincing her to acquiesce in the modification to include the future receipts within the purview of the agreement, the Law Firm failed to provide her with the necessary disclosures required for such a modification, including (1) the fact that it intended to charge a fee for as long as coal was mined on the property, (2) the possibility that the fee could be astronomical, (3) that it intended to charge the fee against the clients' children and grandchildren; and (4) the alternatives to including the work under the contingent fee agreement.

Feeling that they had no alternative at that stage of the proceedings, Ms. Marks and Ms. Luther acquiesced in the modification of the contingent fee agreement.

The agreements which were negotiated in 1998 were renegotiated in 2002.

Assignments of Error

I. **The Circuit Court erred in finding that, as a matter of law, there was no modification of the contingent fee agreement.**

II. **The Circuit Court erred in finding the ultimate fee sought by the Law Firm to be reasonable as a matter of law.**

III. **The Circuit Court erred in holding that the Statute of Frauds was not applicable to the modification of the contingent fee agreement.**

Standard of Review

The Supreme Court of Appeals exercises plenary review over circuit court's decision to grant partial summary judgment. ***West Virginia Rules of Civil Procedure***, Rule 56(c); ***Tolliver v. Kroger Co.***, 201 W.Va. 509 , 498 S.E.2d 702 (1997).

The entry of a summary judgment is reviewed de novo. ***Wood v. Acordia of West Virginia, Inc.***, 217 W.Va. 406, 618 S.E.2d 415 (2005); ***Angelucci v. Fairmont General Hosp.,***

Inc., 217 W.Va. 364, 618 S.E.2d 373 (2005); ***Wilson v. Daily Gazette Co.***, 214 W.Va. 208, 588 S.E.2d 197 (2003); ***Wilkinson v. Duff***, 212 W.Va. 725, 575 S.E.2d 335 (2002).

The Supreme Court of Appeals reviews a circuit court's grant of summary judgment de novo, and applies the same standard as the circuit court, reviewing all facts and reasonable inferences in the light most favorable to nonmoving party. ***Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.***, 196 W.Va. 692, 474 S.E.2d 872 (1996); ***Slivka v. Camden-Clark Memorial Hosp.***, 215 W.Va. 109, 594 S.E.2d 616 (2004); ***Wilson v. Daily Gazette Co.***, 214 W.Va. 208, 588 S.E.2d 197 (2003).

Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. ***Wilson v. Daily Gazette Co.***, 214 W.Va. 208, 588 S.E.2d 197 (2003).

A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment. ***Taylor v. Culloden Public Service Dist.***, 214 W.Va. 639, 591 S.E.2d 197 (2003).

Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. ***Poling v. Pre-Paid Legal Services, Inc.***, 212 W.Va. 589, 575 S.E.2d 199 (2002).

Discussion of the Law

I. The Circuit Court's finding that, as a matter of law, there was no modification of the contingent fee agreement, was in error.

The Law Firm was retained to prosecute an action for "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property." The contingent fee agreement further provided that the Law Firm would receive a

percentage of the "**loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property.**"

When that portion of the lawsuit was resolved and the amount of damages was settled upon, there remained the fact that the coal companies lacked a valid lease and other agreements with Ms. Marks and Ms. Luther, who owned a share of the property.

Accordingly, the companies negotiated a new lease and side letter agreement with Ms. Marks and Ms. Luther. The income generated from these new agreements was not "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property," but rather new income going forward. As a result, the services provided by the Law Firm in negotiating and drafting these agreements was not within the contingent fee agreement and the firm should have been separately compensated on an hourly basis for these services.

The Law Firm raises the argument, for the first time on appeal, that the new lease and side letter agreements were negotiated as part of the settlement "so that Cannelton and Laxare could pay its *(sic)* damages over time rather than in one lump sum." If the grant of summary judgment is reversed, the appellants are prepared to present testimony that this argument is completely unfounded. The new lease and side letter agreement are at a market rate and include no payment for past damages.[3]

Even if it were not so clear that these damages were not within the purview of the contingent fee agreement, any ambiguity must be resolved against the Law Firm. To the extent that the contingent fee agreement may be found to be ambiguous as to whether the negotiation of a lease constitutes damages for wrongful mining, the comment to Section 18 of the

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[3] **The appellants are prepared to present expert testimony that the going rate in Boone County for such leases is 5% to 8%. The lease agreement in this case is at 6%. In addition, unlike the typical lease, in this case the landowners are required to pay the property taxes.**

Restatement (Third) of the Law Governing Lawyers provides that contingent fee contracts are traditionally interpreted against the lawyers. In fact, in ***Beatty v. NP Corp.***, 31 Mass.App. Ct. 606, 581 N.E.2d 1311 (Mass.App. 1991), the court stated that "[a]s a general proposition, the meaning of a written document, if placed in doubt, is construed against the party that wrote it, ***Merrimack Valley Natl. Bank v. Baird***, 372 Mass. 721, 724, 363 N.E.2d 688 (1977), and the principle surely counts double when the drafter is a lawyer writing on his or her own account to a client. In setting fees, lawyers 'are fiduciaries who owe their clients greater duties than are owed under the general law of contracts,'" citing ***Restatement (Third) of the Law Governing Lawyers*** § 46, comment b (Tent. Draft No. 4, 1991).

Despite the fact that these services should have been billed separately on an hourly basis, the firm was apparently not satisfied with this arrangement and sought to receive a percentage of the future rents produced by the lease and side agreement. In a letter dated March 31, 1998, after the settlement agreement had been reached, Ray Byrd wrote to Ms. Marks and Ms. Luther and recounted an agreement from a telephone conference in which he states the parties agreed that the firm would get 30% of future payments. In fact, Ms. Luther and Ms. Marks were told that would be the arrangement and were given no option but to accede.

This issue is addressed in Section 18 of the ***Restatement (Third) of the Law Governing Lawyers***, which provides as follows:

> § 18. Client-Lawyer Contracts
>
> (1) A contract between a lawyer and client concerning the client-lawyer relationship, including a contract modifying an existing contract, may be enforced by either party if the contract meets other applicable requirements, except that:
>
> (a) if the contract or modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter [see § 38(1)], the client may avoid it unless the lawyer

shows that the contract and the circumstances of its formation were fair and reasonable to the client; and

(b) if the contract is made after the lawyer has finished providing services, the client may avoid it if the client was not informed of facts needed to evaluate the appropriateness of the lawyer's compensation or other benefits conferred on the lawyer by the contract.

(2) A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.

Comment e to Section 18 of the ***Restatement*** provides that "[c]lient-lawyer fee contracts entered into after the matter in question is under way are subject to special scrutiny [cf. ***Restatement Second, Contracts*** § 89(a) (promise modifying contractual duty is binding if fair and equitable in view of circumstances unanticipated when contract was made)]. A client might accept such a contract because it is burdensome to change lawyers during a representation. A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good. A lawyer, on the other hand, usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter. A lawyer is also required to give the client at least minimal information about the fee at the outset [see § 38(1)]."

"The client's option under this Section to avoid the contract may be exercised during or after the representation. In particular it may be exercised during litigation about the lawyer's fee, because that is when the former client is most likely to seek new counsel and learn the facts relating to the fairness of the contract." ***Id.***

In the instant case, the modification of the contingent fee agreement occurred after the settlement was reached and when there was no longer any risk in the litigation. As was noted in ***In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation***, 290 F.Supp.2d 840, 850-51 (N.D. Ohio 2003):

> Benjamin N. Cardozo School of Law Professor Lester Brickman, a leading commentator in this area, explains that the "ethical justification" for contingency fee agreements is that "the lawyer's risk of receiving no fee... merits compensation in and of itself; bearing the risk entitles the lawyer to a commensurate risk premium." Brickman, ***Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?***, 37 U.C.L.A. L.Rev. 29, 70 (Oct.1989) (hereinafter, "Brickman "). The necessary corollary to this observation is that "charging a contingent fee grossly disproportionate to any realistic risk of nonrecovery would amount to charging a 'clearly excessive' fee." Brickman, 37 U.C.L.A. L.Rev., at 71. In other words, "[i]n the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of Disciplinary Rule 2-106(A)." ***[Committee on Legal Ethics v.] Tatterson***, [177 W.Va. 356], 352 S.E.2d at 114 [(1986)]. ***See Restatement (Third) of the Law Governing Lawyers***, § 35 cmt. c, at 258 (2000) ("large fees unearned by either effort or a significant period of risk are unreasonable") (hereinafter, "Restatement"); 1 Hazard & Hodes, ***The Law of Lawyering***, § 8.6 at 8.16 (3rd ed. 2000) ("[N]ot every contingent fee is justifiable by appeal to the lawyer's assumption of the risk of nonrecovery. There are situations in which the lawyer knows in advance that the contingency factor is negligible, or in which the lawyer's effort bear virtually no relationship to the size of the recovery, resulting in pure windfall."); Wolfram, ***Modern Legal Ethics***, § 9.4.1 at 529 (1986) ("lawyers can use their superior knowledge of the risk and costs involved to set their percentage fee at a high figure that bears little relationship to the time and money that lawyers must put at risk").

It is interesting that the Ohio District Court relied upon the West Virginia case of ***Committee on Legal Ethics v. Tatterson***, 177 W.Va. 356, 352 S.E.2d 107 (1986). In ***Tatterson***, this Court stated:

> The requirement that the client be fully informed applies especially to a contingent-fee contract. The client needs to be fully informed as to the degree of risk justifying a contingent fee. Courts generally have insisted that a contingent fee be truly contingent. The typically elevated contingent fee reflecting the risk to the attorney of receiving no fee will usually be permitted only if the representation indeed involves a significant degree of risk.

177 W.Va. at 362-63, 352 S.E.2d at 113-14.

In this case, there is absolutely no evidence that the law firm informed the client at the time of the modification that it intended to charge a fee for as long as coal was mined on the property, the possibility that the fee could be astronomical, or that it intended to charge the fee against the clients' children and grandchildren.

In addition, the law firm fails to address the effect of the fact that the lease was renegotiated in 2002. Does the contingent fee continue even though the 1998 lease is no longer in effect. What if the lease is again renegotiated? Does the law firm expect to claim 30% of the royalties for as long as coal is mined on the property. That is clearly improper.

The law firm also contends that its clients waived any objection to the contingency fee agreement and to the modification of the agreement by complying with the same for 15 years. First, it has not been 15 years since the clients learned that the law firm insisted on taking a percentage of future payments under the lease. That did not occur until 1998, and in 2003, the defendants objected to the agreement.

More importantly, the parties have a continuing right to object to an excessive fee. The cases cited by the plaintiff in their motion did not deal with the issue of attorneys fees. On the other hand, in ***Committee on Legal Ethics v. Tatterson***, 177 W.Va. 356, 352 S.E.2d 107

(1986), this Court held that if an attorney's fee is grossly disproportionate to the services rendered, the fee is "clearly excessive" within the meaning of Disciplinary Rule 2-106(A), even though the client has consented to such fee."

The rationale for this rule is explained in Section 18 of the ***Restatement (Third) of the Law Governing Lawyers***. In comment e, the authors note that "[t]he client's option under this Section to avoid the contract may be exercised during or after the representation. In particular it may be exercised during litigation about the lawyer's fee, because that is when the former client is most likely to seek new counsel and learn the facts relating to the fairness of the contract."

Accordingly, there is no waiver of the right to object to the unreasonable and exorbitant fee.

The modification was made without the appropriate disclosures and cannot be said to be valid. In essence, the modification grants the Law Firm a 30% interest in the property.

II. The fee sought by the Law Firm is unreasonable.

As noted previously, the Law Firm received a fee of $1,108,409.56 for its services in this case, representing a premium of 2.66 times its hourly rate. To date, there have only been minimum royalty and wheelage payments on the lease. As coal mining commences on the property, the royalties could extend into millions of dollars, with the law firm claiming 30% of the royalties. This could end up in a fee of millions of dollars for negotiating and drafting a lease. The excessiveness of such a fee is obvious.

In ***Committee on Legal Ethics v. Tatterson***, 177 W.Va. 356, 352 S.E.2d 107 (1986), this Court stated:

> If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is "clearly excessive" within the meaning of Disciplinary Rule

2-106(A), even though the client has consented to such fee. The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee. *See* ***In re Kennedy***, 472 A.2d 1317, 1322, 1330-31 (Del.), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2388, 81 L.Ed.2d 346 (1984); ***Florida Bar v. Moriber***, 314 So.2d 145, 149 (Fla.1975); ***Harmon v. Pugh***, 38 N.C.App. 438, 444, 248 S.E.2d 421, 424-25 (1978), *petition for discretionary review denied*, 296 N.C. 584, 254 S.E.2d 33 (1979); ***In re Stafford***, 36 Wash.2d 108, 113, 119, 216 P.2d 746, 748, 752 (1950) (en banc); C. Wolfram, ***Modern Legal Ethics*** § 9.3.1 at 520 (1986).

177 W.Va. at 362-63, 352 S.E.2d at 113-14.

In opposition to the motion for summary judgment, the defendants submitted an affidavit prepared and executed by Teresa Tarr, an expert witness retained by the defendants in this case. Ms. Tarr is a former Assistant Disciplinary Counsel in West Virginia and has testified as an expert witness on ethics issues. As the affidavit states, Ms. Tarr has reviewed the record to date in this case, and it is her opinion that the fee collected so far on the lease is grossly disproportionate to the work performed and that the disproportionality will increase as time goes on and more fees are taken. She further opines that the fee violates Rule 1.5 of the ***West Virginia Rules of Professional Conduct***.

In the final paragraph of her affidavit, Ms. Tarr states:

> Based upon the foregoing, the fee as it relates to the lease and side letter agreement is clearly excessive. The present hourly fee for Plaintiff is approximately $515.96. That figure would only continue to increase as time went on and Plaintiff received more and more payments. The $515.96 an hour figure is grossly disproportionate to the work performed since 1998. The agreement is speculative and open-ended. It is evident from the facts of this case that Ms. Marks and Ms. Luther clearly lacked full information about the circumstances of such an agreement. Therefore, the fee is clearly excessive and violative of Rule 1.5 of the West Virginia Rules of Professional Conduct.

The Circuit Court totally ignored this affidavit in granting summary judgment for the Law Firm.

The Law Firm sought to prevent the Circuit Court from considering the Tarr affidavit. First, they contested her qualifications as an expert witness. There can be no serious doubt that she possesses the qualifications to render expert opinions in this area. She has previously served as Disciplinary Counsel in the Office of Disciplinary Counsel of West Virginia. She has for years conducted investigative work for the Office of Disciplinary Counsel. She has served as an expert witness/consultant in cases in seven West Virginia counties and the United States District Court for the Southern District of West Virginia. She has been qualified as an expert witness at trial five times. She has taught ethics courses in the area of lawyer ethics.

It is telling that the plaintiff stated in its reply memorandum in the Circuit Court that it desired an opportunity to cross-examine Ms. Tarr and to designate its own expert witness. Of course, if the motion for summary judgment is denied, the Law Firm will have that opportunity.

The Law Firm also argues that the expert opinions set forth by Ms. Tarr in her Affidavit are not admissible, citing ***Jackson v. State Farm Auto. Ins. Co.***, 215 W.Va. 634, 600 S.E.2d 346 (2004). This argument overlooks the fact that Ms. Tarr is not telling a jury what the law is, but is providing an opinion of the application of the law to the facts to assist the trier of fact. The ***Jackson*** opinion relies heavily on Professor Cleckley's ***Handbook on Evidence for West Virginia Lawyers***, quoting extensively from that work. In his treatise Professor Cleckley notes exceptions to the general rule, stating that "law experts are allowed to testify as to the reasonableness of another lawyer's conduct. In doing so, a lawyer may very well state her understanding of the legal standard on which she based her opinion." 2 Cleckley, ***Handbook on Evidence for West Virginia Lawyers***, (Cum. Supp.) § 7-4.

Before the Circuit Court, the Law Firm attempted to justify the fee as analogous to a structured settlement. A structured settlement, however, provides for a set payment over either

a set number of years or over the life of the payee, which can be judged by reference to mortality tables. See comment e to Section 35 of the ***Restatement (Third) of the Law Governing Lawyers***. In such situations, the present value or cost of the structured settlement can be determined and all parties will be aware of the value prior to settlement. In this case, there is no such ability, and there is no evidence that the law firm disclosed the potential value of the fee before imposing the modification on its clients.

In the Circuit Court, the Law Firm further attempted to justify a huge fee of unknown proportions by stating that (1) the damages could have been as high as 59 million dollars, and (2) that courts have awarded fees of $1,000.00 per hour. First, the reliance on the 59 million dollars is fatuous, since the Law Firm pressured its clients to accept a settlement of $750,000.00, in which case the fee would have been only $225,000.00 – far less than what they ultimately received from the damages for past mining. Second, it is at this point impossible to determine the hourly rate which the Law Firm will receive. If there is enough mining going forward, their fee could be greatly in excess of $1,000.00 per hour. In addition, in a case upon which the Law Firm relied before the Circuit Court, the damages were known, the fee was not being paid by the client, the Court found an exceptionally high risk and novel issues involved, and the Court found that the law firm was enforcing an important public policy. As noted above, when the Law Firm convinced the defendants to acquiesce in the modification to the contingent fee agreement, there was absolutely no risk; the case had been settled.

This Court should not permit the Law Firm to exact a huge fee of unknown proportions from the Petitioners for the negotiation and drafting of coal mining agreements.

III. The modification of the contingent fee agreement violates the Statute of Frauds.

West Virginia Code § 55-1-1 provides that an agreement that is not to be performed within one year may not be enforced unless in writing and signed by the party against whom

it is charged. The modification to the contingent fee agreement is not signed by either Josephine Luther or Mary Catherine Marks. Accordingly, it cannot be enforced against them or their successors.

Relief Prayed For

It is clear that Ms. Marks and Ms. Luther did not intend to make the Law Firm a 30% owner of the property, a partner in their business, or a member of the family.

The Circuit Court erred in granting the motion for summary judgment when there were and are genuine issues of material fact. These issues include (1) whether the services performed in negotiating and drafting the coal agreements falls within the ambit of the contingent fee agreement as "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property;" (2) whether the inclusion of the coal agreement services constituted a modification of the contingent fee agreement; (3) whether the Law Firm provided sufficient disclosure to its clients in insisting that the drafting of the agreements be compensated under the contingent fee agreement; and (4) whether the fee sought is reasonable.

Accordingly, the Appellants respectfully pray that this Court reverse the decision of the Circuit Court of Ohio County.

FRANCIS G. MARKS, JOHN L. MARKS, JR., PATRICIA J. MARKS, ELIZABETH A. McCLURE, M. CHESLEY MARKS, ANTHONY MARKS, CATHERINE D. MARKS, EAST ENDERS, L.L.C., and **JOSEPHINE LUTHER**, Petitioners,

By _____
Of Counsel

CERTIFICATE OF SERVICE

Service of the foregoing ***Appellants' Brief*** was had upon the Appellee by mailing a true copy thereof via regular first class United States mail, postage prepaid, addressed as follows, this 25th day of October, 2006:

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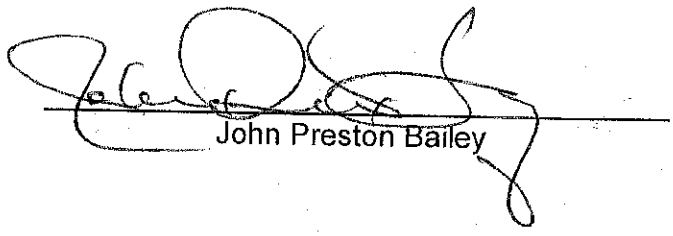

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